In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 743

GEORGE LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on July 13, 1964 (Pet. 52). A petition for rehearing was denied on November 2, 1964 (Pet. 14). The petition for a writ of certiorari was not filed until December 7, 1964, and is therefore out of time under Rule 22(2), Rules of this Court. Although on November 10, 1964, the court of appeals stayed its mandate as to petitioner for a period of 30 days from November 9, 1964 (Pet. 47–48), the stay had no effect upon the running of the time for filing a petition for a writ of certiorari. Cf. *Boylan* v. *United States,* 257 U.S. 614.

Untimeliness aside, the present case raises no issue meriting review by this Court. In the court of

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appeals, petitioner contended that the evidence was insufficient to sustain his conviction for unlawful transportation of counterfeited securities in foreign commerce (18 U.S.C. 2314 (Supp. IV)) and for conspiracy to violate that statute (18 U.S.C. 371), and that evidence of two statements made by the petitioner's co-defendant was improperly admitted against petitioner under the co-conspirator exception to the hearsay rule. As to the first point, the court of appeals held that there was ample evidence from which the jury could find that counterfeited bonds had been transported by the petitioner in violation of the statute, and its opinion correctly summarizes the evidence which supports its decision (Pet. 9–12). The court of appeals did not reach the second question presented by petitioner since it held that the first of the two statements in issue was admissible on other grounds and that "no proper objection was made to the reception of" the second statement at the trial (Pet. 13; see Tr. 162). Petitioner does not seriously challenge either holding.

The main thrust of the petition is that this Court should reach an issue which was presented for the first time in a petition for rehearing in the court of appeals, and disposed of without hearing or opinion. Petitioner contends that during the course of argument to the district court on his motion for judgment of acquittal, an attorney for the government made a statement which was irrelevant and allegedly prejudicial—a statement with respect to petitioner's being under other charges. No objection appears to have been taken to the statement at trial (Tr. 297), so

that the petitioner would have been precluded from raising the issue on appeal had he attempted properly to do so. In any event, although 28 U.S. 753 provides for recording all proceedings in open court in criminal cases, the failure to record mere argument of counsel in the absence of a jury is obviously far removed from the failure to record argument of counsel to a jury, the situation in *Fowler* v. *United States*, 310 F. 2d 66 (C.A. 5). There is no basis for assuming prejudice to the petitioner, and neither the record nor the affidavit which accompanied the petition for rehearing below (Pet. 22–24) provides any such basis. To the contrary, although the district court did express the view that the motion for judgment of acquittal presented a close question (Tr. 297), it is clear that the record contained sufficient evidence to sustain a guilty verdict, as subsequently held by the court of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964